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IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOH: M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

The brief of New York's Attorney General ignores many basic factors which, in our view, are controlling in fact and law and render his arguments academic, irrespective of their being also unsound.

These basic factors are:

(1) The petitioner's sanction, occupation and property rights derive from the United States,—not from New York.

They are a federal creation, established and vested by the Federal Tariff Act of 1930, the Regulations thereunder and the Internal Revenue Code, in implementation of a federal program and policy in the national interest (2a-6a).

The Treasury Department, Bureau of Customs, "has approved plaintiff's procedures and has ruled that plaintiff's business constitutes the exportation of merchandise within the meaning of Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311" (131a).

Hence, since the *res* and its factual and legal substance are essentially, and indeed exclusively, *federal*, the federal court should proceed at once as against the civil and penal outlawry thereof by New York's Attorney General and Liquor Authority. (Complaint, pars. 7, 8, 12; our preceding brief, pp. 5, 22-5; 28 U. S. C. §§1331, 1337, 2281, 2284; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 386, 391-2; *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85-6.)

(2) This federal legislation is avowedly an exercise of the federal government's exclusive power over foreign commerce and exports and imports.

It also is inherently and designedly *preemptive*,—operative independently of state action and with immunity from state interference.

Hence, there was no occasion, propriety or relevancy for first submitting to New York courts the nullifying declarations and actions of New York's Attorney General and Liquor Authority in professed enforcement of the State's civil and penal laws. (Our brief, pp. 22-5.)

(3) The complaint states claims for relief under 28 U. S. C., sections 1331 and 1337 conferring original jurisdiction on the district court (composed of one judge) over "any civil action or proceeding arising under any Act of Congress regulating commerce"; and also under sections 2281-4 conferring jurisdiction on the district court (composed of three judges) where the constitutionality of state action is challenged (11a-14a).

The petitioner is entitled to such relief as the facts warrant. (F. R. C. P., Rule 54c.)

Judges Bicks and Dimock and the Court of Appeals refused any exercise of jurisdiction unde any of these sections, notwithstanding that imminent irreparable damage to petitioner's federal property rights was obvious and admitted, and no state court action was pending. As said by the Court of Appeals (104a, 106a):

> "Judge Bicks • • • in effect granted defendants' motion to dismiss. • • • There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. • • • However, the order of Judge Bicks had the effect of dismissing a complaint • • •."

In consequence the Court of Appeals held (105a) that the "appellees' argument that this (Judge Bicks') order was not final and hence unappealable under 28 U. S. C. §§1291, 1292 is not well taken."

(4) The doctrine of "abstention" could in no event have any application where, as here, the New York courts had already decided (with affirmance by this Supreme Court) the precise underlying issue here, to wit, that the

New York Alcoholic Beverage Control Law is inapplicable or "inoperative" if applied to sales of liquor under United States Custom Bond, regulation and supervision, pursuant to Section 311 of the Tariff Act of 1930, for export in foreign commerce; and that "international transactions in alcoholic beverages" "would be beyond the regulatory powers of the State Liquor Authority". (Our preceding brief, p. 26; and decisions there cited.)

This fact negatives the statement in the Attorney General's brief (p. 9) that on the construction of the state statutes "we have only an opinion of the Attorney General of the State".

Remission to the state courts is inappropriate where the state courts have already given "an authoritative interpretation of the local law." (*Hillsborough* v. *Cromwell*, 326 U. S. 620, 629.)

Particularly is this true where, as here, the petitioner's federal property rights are threatened by a state authority with annihilation under state civil and penal laws, and the state authority is, as here, proceeding by subpoena *duces tecum* to exercise and enforce its claims of power and is interdicting the petitioner's suppliers under the federal law (6a, 7a, 51a, 66a, 76a, 78a-81a).

(5) Immediate annihilation of the petitioner's federal business, valued in excess of $1,000,000, is the purpose and the pending triple procedure of the Liquor Authority, aimed at outlawry of the petitioner, its suppliers and its Idlewild leasehold from the Port Authority (7a, 8a, 51a, 76a, 78a, 80a, 91a).

II

A predicate of the Attorney General's brief (pp. 9, 10) is that the presence of a substantial constitutional question can only be determined by awaiting final decision in the state courts.

This is not realistic here. Judge Dimock expressed the obvious when he said (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

For like reason the Court of Appeals held that "a three-judge district court should have been convened" (109a).

III

A second predicate in the Attorney General's brief (p. 10) is that since (as he claims) a one-judge district court has "conceded jurisdiction to determine whether there exists a substantial question under the Federal Constitution," "abstention pending construction by the State courts, is an incident to the performance" of such one-judge jurisdiction.

But the Court of Appeals expressly and correctly held the precise opposite, to wit, that (108a)

> "the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court."

Hence, added the Court of Appeals (108a): "Judge Bicks had no jurisdiction to proceed as he did," and in consequence under *Stratton* his order was not appealable to that Court.

On the other hand, the above contention by the Attorney General necessarily leads to the conclusion that Judge Bicks *did have jurisdiction* to do what he did, and that in consequence his refusal to exercise jurisdiction and his refusal of the temporary injunction requested *were appealable* to the Court of Appeals under 28 U. S. C. §§1291, 1292.

The Attorney General cannot have it both ways.

IV

A third predicate in the Attorney General's brief is (pp. 8, 9) that "there must be State action pending to vest a three-judge District Court, under 28 U. S. C. §2284, with exclusive jurisdiction to consider the question of abstention."

Sections 2281 and 2284 contain no such requirement. On the contrary, they expressly include for jurisdictional purposes "the action of any officer" of the state or an "order" of its administrative board or commission.

Nor do sections 1331 and 1337, U. S. C. contain such a requirement.

His brief refers (p. 8) to the power of the three-judge court under section 2284(5) to stay temporarily its own further proceeding where an outstanding state court "stay" of enforcement already exists. Actually, this provision predicates the very opposite of conditioning federal jurisdiction of a federal suit upon prior pendency of a state court suit.

V

Still another predicate in the Attorney General's brief is (p. 12, footnote) that inadequacy of any state remedy is beside the point

> "because the District Court, whether one-judge or three-judge, may nevertheless restrain the respondents as an incident of its retention of jurisdiction pending State adjudication of the merits of the case."

One effective comment is that Judge Bicks did *not* restrain the Liquor Authority pending state court adjudication—notwithstanding the pleading and his own finding of immediate irreparable damage (7a, 8a, 51a). Judge Dimock expressly refused just such a restraint (89a).

Moreover, the Court of Appeals held that just such a restraint was "properly issuable only by a three-judge district court" (110a).

VI

The Attorney General's brief argues in a circle, and thereby arrives at a conclusion which would paralyze all action under sections 2281-4 until prior final determination by the state courts. To quote (p. 8):

> "It is conceded that, if the only question involved herein were the constitutionality of the State statutes under the Federal Constitution, the District Court would have had no choice but to convene a three-judge District Court (28 U. S. Code §2281). But the premise for this concession is not present in this case. Constitutionality cannot be determined without a prior

construction of the State statutes. State judicial construction in such cases is, of course, the governing principle and is binding upon both the three-judge District Court and this Court (*Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 [1928])."

The only authority cited for this circular contention, which would certainly hamstring sections 2281-4, is *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 (1928),—a case which was not an action under Sections 1337 or 2281-4 or even one originating in a federal court.

This Court has conclusively held that where the action is not only on federal constitutional grounds but also includes "a non-constitutional federal issue which depends upon the decision on an underlying issue of state law," "the case is one that is *required*" "to be heard and determined by a district court of three judges". (*Propper* v. *Clark*, 337 U. S. 472, 490; *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85.)

VII

The Court of Appeals twice characterized its position and decision as "anomalous" (108a), and its results as "unhappy ones" (110a) and as creating "obvious difficulties" (106a).

For over a year and at vast expense, the petitioner has found itself entangled from the outset in a thicket of diverse judicial views on "only a procedural question",—to quote the Attorney General's brief, which thereupon adds a separate view of its own.

We submit that for the protection of the petitioner, the certainty of law, the interests of justice, and the vindication of federal preemptive legislation, this Supreme Court should interpose its supervisory jurisdiction.

Respectfully submitted,

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